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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Geographic Partitioning and Spectrum )  
Disaggregation by Commercial Mobile )  
Radio Service Licensees )

WT Docket No. 96-148

Implementation of Section 257 of the )  
Communications Act -- )  
Elimination of Entry Barriers )

GN Docket No. 96-113

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COMMENTS OF NEXTWAVE TELECOM, INC.

NextWave Telecom, Inc. ("NextWave") hereby submits its comments on the Commission's July 1996 Notice of Proposed Rulemaking in the above-captioned Dockets.<sup>1/</sup> NextWave strongly supports the Commission's efforts to modify broadband personal communications services ("PCS") rules to expand opportunities for disaggregation and geographic partitioning of PCS licenses.

NextWave agrees with the Commission's conclusion that increasing licensees' disaggregation and partitioning rights will (A) facilitate the efficient use of broadband PCS spectrum, (B) further the Congressional mandate embodied in Section 257 of the Communications Act to eliminate barriers to small businesses' entry into the telecommunications marketplace, and (C) benefit consumers by promoting competition and technological innovation in the provision of broadband PCS services. Expanding

<sup>1/</sup> See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Services Licensees & Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers, Notice of Proposed Rulemaking*, WT Docket No. 96-148, GN Docket No. 96-113, FCC 96-287, released July 15, 1996 ("NPRM").

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opportunities for spectrum disaggregation and partitioning also will strengthen the ability of existing licensees to obtain access to capital that they can use to construct and maintain their PCS networks.

NextWave supports the general framework of disaggregation and partitioning rule modifications proposed in the NPRM, and urges the Commission to implement such modifications without delay. In addition, and as explained more fully below, NextWave offers the following observations concerning issues that are the subject of one or more alternative pending proposals in the NPRM:

- Rule modifications should not penalize entrepreneurial block licensees seeking to disaggregate or partition spectrum. Subjecting such licensees to accelerated payment of bidding credits, unpaid principal and interest, or imposing "unjust enrichment" penalties will arbitrarily discourage beneficial disaggregation and partitioning activity, and thereby undercut the very goals the Commission is attempting to achieve in this proceeding. Granting all parties, including entrepreneurial licensees, maximum flexibility to structure disaggregation and partitioning agreements will generate the greatest public benefits.
- Disaggregation and partitioning that results in a transfer of control over spectrum should free the transferor of any regulatory obligations that attach to such spectrum, consistent with existing precedent. If the Commission decides to formulate new policy here, it should do no more than permit parties to an agreement the freedom to allocate compliance responsibilities among themselves without limitation.
- An existing broadband PCS license that acquires other broadband PCS spectrum in the same geographic area through disaggregation should be permitted to apply its original license term to the newly-acquired spectrum.

**I. ENTREPRENEURIAL BLOCK LICENSEES SHOULD NOT BE PENALIZED FOR DISAGGREGATING & PARTITIONING SPECTRUM.**

The NPRM proposes a variety of penalties on entrepreneurial block licensees who disaggregate or partition their spectrum. These penalties include accelerated payment of

bidding credits, unpaid principal or interest, and requiring "unjust enrichment" penalties.<sup>2/</sup>

Imposing these penalties would undermine the very benefits the Commission's proposals seek to generate. Therefore, such proposals should not be adopted.

Penalizing entrepreneurial licensees in the proposed manner will substantially discourage beneficial disaggregation and partitioning activity. Imposing "unjust enrichment" penalties will have the same result. As the NPRM acknowledges,<sup>3/</sup> there is no economically rational way to establish the relative values of entrepreneurial bidding provisions and the market price of opportunities to obtain spectrum in disaggregated or partitioned areas. Attempting to do so will produce wholly arbitrary results.

In addition, adopting these proposals will impose an unreasonable competitive disadvantage on entrepreneurial licensees vis-a-vis their A, B, D and E block competitors, who would not be subject to them. It also will distort the market for spectrum by artificially affecting the relative values of entrepreneurial and non-entrepreneurial spectrum. The Commission should not accentuate the significant headstart-to-market advantages already enjoyed by A and B block broadband PCS licensees.

The sound economic principles underlying the spectrum auction process, coupled with the Commission's decision to prevent complete license transfers of entrepreneurial block spectrum through disaggregation or partitioning, obviate the need to adopt additional penalties for disaggregating and partitioning such spectrum. Indeed, once an entrepreneurial licensee has met its 5-year buildout requirements, it has unambiguously demonstrated that it

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<sup>2/</sup> See NPRM at paras. 22-26, 46-48.

<sup>3/</sup> See NPRM at para. 25.

is not "gaming" the entrepreneurial block rules. At that point, the Commission's should permit that licensee to disaggregate or partition its spectrum to any party without limitation.

## **II. THERE IS NO REASON TO IMPOSE UNIQUE REGULATORY OBLIGATIONS ON DISAGGREGATING OR PARTITIONING LICENSEES**

In the NPRM, the Commission tentatively concludes that in certain instances an entity that has relinquished control over PCS spectrum through disaggregation or partitioning would continue to be bound by regulatory requirements attaching to such spectrum.<sup>4/</sup> To NextWave's knowledge, such a result would be a substantial departure from existing radio regulatory policy, pursuant to which compliance with regulatory requirements is solely the responsibility of parties to a license. The NPRM does not provide a detailed rationale for the Commission's conclusions. NextWave recommends that they not be adopted.

Instead, the Commission should apply long-standing policy concerning license transfers to determine the transferor's regulatory obligations. Thus, disaggregation or partitioning of spectrum that results in a transfer of control approved by the Commission should free the transferor of any regulatory obligations pertaining to control of the license. Obviously, the Commission must continue to fulfill its statutory obligations to ensure that each license transfer is in the public interest. However, in so doing, the Commission should not reach beyond its existing transfer policy, but allow PCS licensees flexibility in structuring such transfers.

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<sup>4/</sup> See, e.g., NPRM at para. 26 (auctions-related obligations); paras. 52-53 (construction requirements).

Adopting a contrary policy, for example, could place the transferor in the impossible position of being accountable for compliance with regulatory requirements when it is powerless to ensure such compliance (because, by definition, it does not control the license post-transfer). Moreover, it would be arbitrary and capricious in the extreme for the Commission to make one entity the "guarantor" of the actions of another entity over which it has no control, as proposed in the NPRM.<sup>5/</sup>

As a matter of straightforward economics, dictating in advance which party to an agreement must guarantee compliance with such things as buildout and coverage requirements<sup>6/</sup> will arbitrarily shrink the universe of disaggregation and partitioning opportunities, and, concomitantly, reduce the benefits those opportunities would otherwise generate. Thus, if the Commission decides to formulate new licensing policy in this proceeding, it should do no more than permit parties to an agreement the freedom to allocate regulatory compliance responsibilities among themselves.

Furthermore, the Commission should not base its construction benchmarks for disaggregated spectrum on whether the spectrum was originally licensed in 30 MHz or 10 MHz bandwidths, as it proposes in the NPRM. To the extent the Commission believes such construction benchmarks are necessary, it should base them on bandwidth, such that "disaggregates" with less than 10 MHz should be subject to the same benchmarks as the D,

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<sup>5/</sup> See NPRM at para. 26. As mentioned previously, the Commission should allow flexibility to the parties to such a transaction to structure financial aspects of the transfer as appropriate, as long as responsibilities are clearly delineated for payment to the government of the price bid at auction.

<sup>6/</sup> See NPRM paras. 32-34.

E, and F licenses, which includes the possibility of providing service to at least one-quarter of the population or making a showing of substantial service at the five-year benchmark.

### **III. LICENSE TERM**

The Commission seeks comment on the question whether an existing broadband PCS license that acquires additional broadband PCS spectrum in the same geographic area through a disaggregation agreement should be permitted to apply its original license term to the newly-acquired spectrum.<sup>2/</sup> NextWave believes this idea should be adopted because doing so will facilitate the Commission's ability to administer broadband PCS licensing and, concomitantly, will reduce administrative burdens on licensees.

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<sup>2/</sup> See NPRM at para. 57.

#### IV. CONCLUSION

NextWave generally supports the framework of disaggregation and partitioning rule modifications proposed in the NPRM, and urges the Commission to implement such modifications without delay. NextWave recommends that the proposed framework be revised to incorporate the suggestions offered in these comments.

Respectfully Submitted,

NEXTWAVE TELECOM, INC.

A handwritten signature in black ink, appearing to read "Michael Wack", is written over a horizontal line.

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Charla M. Rath  
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August 15, 1996

## CERTIFICATE OF SERVICE

I, Kay Hawkins, hereby certify that on the 15th day of August, 1996, a true copy of the foregoing Comments of NextWave Telecom Inc. was hand delivered to the following:

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